TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 236.

WASHINGTON LIBBY, PLAINTIFF IN ERROR,

vs.

WILLIAM H. CLARK.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

FILED JUNE 21, 1883.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 236.

WASHINGTON LIBBY, PLAINTIFF IN ERROR,

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IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

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1 The President of the United States to the honorable the judges of the supreme court of the State of Kansas, Greeting:

Because in the record and proceedings and also in the rendition of the judgment of a plea which is in the said supreme court, before you, or some of you, being the highest court of said State in which a decision in the suit could be had between Washington Libby, plaintiff in error, and William H. Clark, defendant in error, wherein a title, right, and privilege was claimed under a treaty of the United States, and the decision was against the title, right, and privilege specially set up or claimed under such treaty, a manifest error hath happened, to the great damage of the said Washington Libby, as by his complaint appears:

We being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected
2 the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 28th day of May, in the year of our Lord one thousand eight hundred and eighty-three.

[The Seal of the Circuit Court of the United States, District of Kansas, 1862.]

A. S. THOMAS,
Clerk of the Circuit Court of the United States for the District of Kansas.

Filed Jun. 2, 1883.

C. J. BROWN,
Clerk Sup. Court.

3 Allowed:

ALBERT H. HORTON,
Chief Justice of the Supreme Court of Kansas.

4 The United States to William H. Clark, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday in October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Kansas, wherein Washington Libby is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Albert H. Horton, chief justice of the su-

preme court of the State of Kansas, this 28th day of May, in the year of our Lord one thousand eight hundred and eighty-three.

ALBERT H. HORTON,
Chief Justice of the Supreme Court of the State of Kansas.

I hereby accept service of this citation this 1st day of June, A. D. 1883, and enter my appearance therein.

WILLIAM H. CLARK,
Defendant in Error, for himself.

Filed Jun. 2, 1883. C. J. BROWN,
Clerk Sup. Court.

Ottawa, Kansas.

5 I hereby accept service of the within citation and enter my appearance in the cause therein referred to.
Dated at Ottowa, Kansas, this 29th day of May, 1883.

——— ———,
Defendant in Error.

6 In the Supreme Court of the United States of America.

WASHINGTON LIBBY, Plaintiff in Error,
vs.
WILLIAM H. CLARK, Defendant in Error.

Know all men by these presents, that we, H. F. Sheldon, of Ottawa, Franklin county, and State of Kansas; ——— ———, are held and firmly bound unto William H. Clark, of Ottawa, Kansas, in the sum of five hundred dollars, to be paid to the said William H. Clark, his executors or administrators; to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators firmly by these presents.

Sealed with our seals. Dated this 28th day of May, 1883.

Whereas the above-named Washington Libby hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the supreme court of the State of Kansas:

Now, therefore, the condition of this obligation is such that if the above-named Washington Libby shall prosecute his said writ
7 of error to effect, and answer all costs if he shall fail to make good his plea, then this obligation shall be void; otherwise, to remain in full force and virtue.

H. F. SHELDON.

The above & foregoing bond, and the surety thereon, approved this 28th day of May, A. D. 1883

ALBERT H. HORTON,
Chief Justice of the Supreme Court of the State of Kansas.

Filed Jun. 2, 1883. C. J. BROWN,
Clerk Sup. Court.

8 In the Supreme Court.

WASHINGTON LIBBY, Plaintiff in Error,
vs.
WILLIAM H. CLARK, Defendant in Error.

STATE OF KANSAS, *ss:*

Be it remembered that on the twenty-eighth day of July, A. D. 1880, there was filed in the office of the clerk of the supreme court of the State of Kansas a certified copy of the pleadings and record in said case from the district court of the county of Franklin county, which is in words and figures as follows, to wit:

Case Made for the Supreme Court.

In the District Court of Franklin County, Kansas.

WASHINGTON LIBBY
vs.
WILLIAM H. CLARK. } No. 2543.

On November 20th, 1879, the said Washington Libby filed a petition in the district court of Franklin county, Kansas, of which (except caption and signature of counsel) the following is a copy:

"Washington Libby, plaintiff, complains of William H. Clark, defendant, for that the said Libby has a legal or equitable estate in the east half of the west half (E. ½ of the W. ½) of section 30, and in the east half of the northwest quarter (E. ½ of N. W. ¼) of section 31,
9 all in township 16 of range 20, in Franklin county, Kansas, and is entitled to the possession thereof; and that the said Clark unlawfully keeps him out of the possession thereof; wherefore the plaintiff prays judgment, awarding to him the possession of said real estate and the costs of this suit and all other proper relief."

To said petition, on December 11th, 1879, said Clark filed an answer, of which (except caption and signature of counsel) the following is a copy:

"Now comes the said defendant, William H. Clark, and for answer to the petition of said Washington Libby, plaintiff herein, says: That said plaintiff ought not to have and maintain his said action against said defendant, because he says that said plaintiff is not seized of any title, estate, or interest in or to the said premises in his petition mentioned, or any part thereof; wherefore said defendant asks judgment against said plaintiff for his costs."

On the 27th day of May, 1880, at the May term of said district court, this cause came on to be tried by that court and a jury upon the foregoing pleadings and the evidence; and the plaintiff having by counsel opened his case, then to maintain the issues, upon his part, read in evidence an agreed statement of certain facts, of which (except the caption and signatures of the parties) the following is a copy:

"It is agreed, to save further proof of the same, that the following are facts in this case, viz:

"William Hurr is by birth, blood, and descent an Ottawa Indian of the tribe of Blanchard's Fork and Roche De Boeuf, and was before and on and after the 24th day of June, 1862, one of the chiefs, councilmen, and headmen of said tribe mentioned and provided for in the first sentence of article 3 of the treaty between the United States of America and said tribe, concluded June 24th, 1862. (12th U. S. Statutes at Large, p. 1237.) I. S. Kallock and wife, Washington Libby, and William H. Clark are natural white citizens of the United States of America, and are not, and never were, members of any tribe of Indians.

"The lands herein sued for—being the E. ½ of the W. ½ of section 30 and the E. ½ of the N. W. ¼ of section 31, all in township 16, of range 20, in Franklin county, Kansas—were part of the five sections of land reserved and set apart by the 3d article of the treaty aforesaid to be apportioned among the said chiefs, councilmen, and headmen, as the members of the tribe should, in full council, determine; and the same were so located and apportioned to said William Hurr as such chief, councilman, and headman, and were by the United States of America conveyed to him by a patent, of which a copy is annexed to and made a part of this agreement.

"It is further stipulated that, at any future trial or hearing of this cause, in said court, either party may give such further evidence, relevant, competent, and material, as he may see fit, and may read in evidence the copy of any material conveyance of record in the office of the register of deeds of Franklin county, Kansas, without producing or accounting for the original."

The following is a copy of said patent, which was then read in evidence by the plaintiff, viz:

The United States of America to all to whom these presents shall come, Greeting:

Whereas there has been deposited in the General Land Office a return, dated 17th March, 1864, from the Office of Indian Affairs, containing certain lists showing the selections of allotments made for the use of certain Ottawa Indians under the treaty concluded on the 24th day of June, 1862, between the United States and the Ottawa Indians of Blanchard's Fork and Roche de Boeuf, in the State of Kansas, as ratified on the 28th day of July, 1862, which lists were duly approved by the Secretary of the Interior, under date of March 9th, 1864; and whereas it appears from one of the lists aforesaid that the east half of the northwest quarter of section seven, in township seventeen, the east half of the west half of section thirty, and the east half of the northwest quarter of section thirty-one, in township sixteen, south of range twenty, east of the 6th principal meridian in Kansas, containing 320 acres, has been designated as the allotment of William Hurr: Now, know ye that the United States of America, in consideration of the premises, and pursuant to the 3d and 7th articles of the treaty aforesaid, have

given and granted, and, by these presents, do give and grant, unto the said William Hurr and to his heirs the tract of land above described: Provided, however, and these presents are upon the express condition, and with the limitation, as required by the treaty aforesaid, that the said William Hurr shall not alienate or encumber the aforesaid tracts of land until he shall become, by the terms of said treaty, a citizen of the United States; and any conveyance or encumbrance of said lands, done or suffered by said William Hurr, made before he shall become a citizen, shall be null and void; to have and to hold the said tracts of land with the appurtenances unto the said William Hurr and to his heirs and assigns forever, subject to the limitation and condition aforesaid.

In testimony whereof I, Andrew Johnson, President of the United States, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the city of Washington, this first day of December, in the year of our Lord one thousand eight hundred and sixty-five, and of the Independence of the United States the ninetieth.

[Seal of the U. S. General Land Office.]

By the President:

ANDREW JOHNSON,
By EDW. D. NEILL, *Secretary.*
S. GRANGER,
Recorder of the General Land Office.

Recorded vol 1, page 224.

The plaintiff then gave in evidence the "Census Roll," of which here follows a copy of so much as is material to this action, viz:

Census Roll of Ottawa tribe of Indians and List of Allotments of Land made to them under their Treaty of June 24, 1862:

Family.	Person.	Names of allottees.	Man.	Woman.	Boy.	Girl.	Age.	Subdivisions.	Section.	Town.	Range.	Acres.
1	1	Wm. Hurr..	1	...	...	...	35	E. ½ S. E...	1	17	19	80
								S. W., N. E..	12	17	19	40
								N. W., S. E..	12	17	19	40

W. E. S.

11 (Omitting names, &c. of other Indians.)

"DEPARTMENT OF THE INTERIOR, *March 9th*, 1864.

"The foregoing list of selections of allotments of land to certain Ottawa Indians and the Baptist Church, under the provisions of the treaty of June 24, 1862, is hereby approved.

"J. P. USHER,
"*Secretary.*"

The following lands are allotted under article 3d of the Ottawa treaty, which sets apart five sections of land to be apportioned

among the chiefs, headmen, &c., and for which patents in fee simple are to be issued by the Secretary of the Interior:

No.	Name.	Subdv.	Sec.	T.	R.	Acres.
1	William Hurr	E. ½, N.W.	7	17	20	80
	do.	E. ½, N.W.	31	16	20	80
	do.	E. ½, of W. ½.	30	16	20	160

(Omitting other Indians, &c.)

"We hereby certify that the foregoing is a true and accurate list of the lands allotted to the Ottawa Indians by us, under the provisions of their treaty, concluded June 24, 1862.

"Ottawa Creek, Kansas, Dec. 28, 1863.

"C. C. HUTCHINSON,
"*Ind. Ag't.*
"EDWARD WALCOTT,
"*U. S. Com'r.*

"Department of the Interior, *March* 9, 1864.

"The foregoing list of selections of allotments of lands for the chiefs, councilmen, and headmen of the Ottawa tribe of Indians, is hereby approved under the provisions of the treaty of June 24, 1862.

"J. P. UPSHER,
"*Secretary.*"

The plaintiff then offered in evidence a deed, of which the following is a copy:

This indenture, made the first day of December, in the year of our Lord one thousand eight hundred and sixty-five, between William Hurr and Emily, his wife, Ottawa Indians, of the county of Franklin, State of Kansas, parties hereto of the first part, and Isaac S. Kalloch, of the town of Ottawa and county aforesaid, party hereto of the second part, witnesseth: That the said parties of the first part, for and in consideration of the sum of thirteen hundred (1,300) dollars, lawful money of the United States of America, to him in hand paid by the said party of the second part at or before the unsealing and delivery of these presents, the receipt whereof is hereby acknowledged, the said party of the second part, his heirs, executors, and administrators forever released and discharged from the same, by these presents have granted, bargained, sold, aliened, remised, released, conveyed, and confirmed, and by these presents do grant, bargain, sell, alien, remise, release, convey, and confirm unto
12 the said party of the second part and to his heirs and assigns forever, all those certain pieces or parcels of land being part of what is known as the Ottawa reservation, situate, lying, and being in the said county of Franklin and State of Kansas, and known and distinguished as follows, to wit: The east half (E. ½) of the northwest quarter (N. W. ¼) of section — (S. 30), the E. ½ of the

southwest quarter (S. W. ¼) of section thirty (S. 30), the E. ½ of the northwest quarter (N. W. ¼) of section thirty-one (S. 31), all of township sixteen south (T. 16 S.) of range twenty east (R. 20 E.) and the east half (E. ½) of the northwest quarter (N. W. ¼) of section seven (S. 7) of township seventeen (T. 17) south of range twenty east (R. 20 E.); which said several pieces of land, taken together, contain three hundred and twenty acres (320 A.) of land, more or less, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and also all the estate, right, title, and interest, dower and right of dower, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said parties of the first part of, in, and to the same, and every part and parcel thereof, with the appurtenances, to have and to hold the above granted, bargained, and described premises, with the appurtenances, unto the said party of the second part, his heirs and assigns, to his and their own proper use, benefit, and behoof forever. And the said William Hurr, for himself and his heirs, executors, and administrators, doth hereby covenant, grant, and agree to and with the said party of the second part, his heirs and assigns, that the said parties hereto of the first part, at the time of the sealing and delivery of these presents, are lawfully seized in their own right of a good, absolute, and indefeasible estate of inheritance in fee simple of and in all and singular the above granted, bargained, and described premises, with the appurtenances, and have good right, full power, and lawful authority to grant, bargain, sell, and convey the — in manner and form aforesaid. And that the said party of the second —, his heirs and assigns, shall and may at all times hereafter peacefully and quietly have, hold, use, occupy, possess, and enjoy the above-granted premises, and every part and parcel thereof, with the appurtenances, without any let, suit, trouble, molestation, eviction, or disturbance of the said parties of the first part, their heirs or assigns, or any other person or persons lawfully claiming or to claim the same, and that the same are now free and clear, discharged, and unencumbered of and from all former and other grants, title, charges, estates, judgments, taxes, assessments, and incumbrances of what nature or kind soever; and also that the said parties of the first part and theirs —, and all and every other person or persons whatsoever lawfully or equitably deriving any estate, right, title, or interest of, in, or to the hereinbefore-granted premises by form, under or in trust, or them, or either of them, shall and will at any time or times hereafter, upon the reasonable request and at the proper cost and charges in the law of the said party of the second part, his heirs and assigns, make, do, and execute, or cause or procure to be made, done, and executed, all and every such further and other lawful and reasonable acts, conveyances, and assurances in the law for the better and more effectually vesting and confirming the premises hereby intended to be granted in and to the said party of the second part, his heirs and assigns, forever, as by the said party of the second part, his heirs or assigns, or his or their counsel learned in the law shall be reason-

ably devised, advised, or required. And the said William Hurr, for himself, his heirs and assigns, against the said parties of the first part and their heirs, and against all and every person and per-
13 sons whomsoever lawfully claiming or to claim the same, shall and will warrant and by these presents forever defend.

In witness whereof the said parties of the first part have hereunto set their hands and seals the day and year above written.

WM. HURR. [SEAL.]
her
EMILY × HURR. [SEAL.]
mark.

Sealed and delivered in presence of—
ASA S. LATHROP.

(Stamp $1.50, cancelled.)

STATE OF KANSAS, }
County of Franklin, } *ss:*

On this first day of December, in the year of our Lord one thousand eight hundred and sixty-five, before me personally came William Hurr and Emily, his wife, to me known to be the individuals described in and who executed the within conveyance, who severally acknowledged that they executed the same.

In testimony whereof I have hereunto set my hand and affixed my official seal the day and year last above written.

[SEAL.] ASA S. LATHROP,
Notary Public in and for said County.

Recorded June 20, 1866, at ten a. m.

H. T. SHELTON,
Reg. of Deeds.

Becorded in book "F," page 191.

A true copy. H. B. F. KELLER, *Reg. of Deeds,*
By JNO. W. RAMSEY, *Deputy.*

Fee $1.00, paid.

To the introduction of said deed in evidence defendant objected, for the reasons that said deed was in contravention of the 3d and 7th articles of the treaty between the United States and said Ottawa Indians, ratified July, 1862 (U. S. Stats. at Large, vol. 12, p. 1237) and was therefore null and void, and had been so held by the supreme court of Kansas, in an action then pending between these same parties, wherein this same land was in controversy, which objection was by the court sustained, and said deed ruled out; to which ruling of the court the said plaintiff then and there duly excepted.

The plaintiff then gave in evidence a deed, of which the following is a copy:

This indenture, made the third day of April, in the year of our Lord one thousand eight hundred and sixty-five, between Isaac S. Kalloch and Caroline P., his wife, both of Ottawa, county of Franklin, and State of Kansas, parties hereto of the first part, and Wash-

ington Libby, of the city of Boston and State of Massachusetts, party hereto of the second part, witnesseth: That the said parties of the first part, for and in consideration of the sum of three thousand five hundred (3,500) dollars, lawful money of the United States of America, to them in hand paid by the said party of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, and the said party of the second part, his heirs, executors, and assigns, and administrators, forever released and discharged from the same, by these presents, have granted bargains, sold, aliened, remised, released, conveyed, and confirmed, and byth ese presents do grant, bargain, sell, alien, remise, release convey, and confirm unto the said party of the second part, and to his heirs and assigns, forever, all those certain pieces or parcels of land being a part of what is known as the Ottawa reservation, situate, lying, and being in the said county of Franklin and State of Kansas, and known and distinguished as follows, to wit: The southeast
14 quarter of the northwest quarter of section thirty-five of township sixteen south of range nineteen east; also the east half of the northwest quarter and the east half of the southwest quarter, and the west fractional half of the southwest quarter and the southwest fractional quarter of the northwest quarter, all of section thirty of township sixteen south of range twenty east; also the east half of the northwest quarter of section thirty-one of township sixteen south of range twenty east, which the several parcels of land taken together contain four hundred and eleven acres and ninety-five one-hundredths of an acre of land, be the same more or less, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof and also all the estate, right, title, interest, dower, and right of dower property, possession, claim, and demand whatsoever as well in law as in equity of the said parties of the first part of, in, and to the same and every part and parcel thereof with the appurtenances, to have and to hold the above granted, bargained, and described premises with the appurtenances thereunto, the said party of the second part, his heirs and assigns, to his and their own proper use, benefit and behoof forever. And the — Isaac S. Kalloch, for himself and his heirs, executors, — admininistrators, doth hereby covenant, grant, and agree to and with the said party of the second part and his heirs and assigns that the said parties hereto of the first part at the time of the ensealing and delivery of these presents are lawfully seized in their own right of a good, absolute, and indefeasible estate of inheritance in fee simple of and in all and singular the above granted and bargained and described premises with the appurtenances, and have good right, full power and lawful authority to grant, bargain, sell, and convey the same in manner and form aforesaid, and that the said party of the second part, his heirs and assigns, shall and may at all times hereafter peaceably and quietly have, hold, use, occupy, possess, and enjoy the above-granted premises, and every part and parcel thereof, with the appurtenances, without any let, suit, trouble, molestation, eviction, or disturbance of the said

parties of the first part, their heirs or assigns, or of any other person or persons lawfully claiming or to claim the same, and that the same are now free and clear, discharged, and unincumbered of and from all former and other grants, titles, charges, estates, judments, taxes, assessments, and encumbrances of what nature or kind soever, and also that the said parties of the first part and their heirs and all and every other person or persons whatsoever, lawfully, equitably, deriving any estate, right, title, or interest in or to the hereinbefore-granted premises by form and under or in trust for them, or either of them, shall and will at any time or times hereafter upon the reasonable request and at the proper costs and charges in the law of the said party of the second part, his heirs and assigns, make, do, and execute, or cause or procure to be made, done, and executed, all and every such further and other lawful and reasonable acts, conveyances, and assurances in the law, for the better and more effectually vesting and confirming the premises hereby intended to be granted in and to the said party of the second part, his heirs and assigns, forever, as by the said party of the second part, his heirs or assigns, or his or their counsel, learned in the law, shall be reasonably advised, devised, or required, and the said Isaac S. Kalloch for himself and his heirs, the above-described and hereby granted premises, and every part and parcel thereof, with the appurtenances, unto the said party of the second part, his heirs and assigns, against the said parties of the first part and their heirs, and against all and every person and persons whomsoever lawfully claiming or to claim the same shall and will warrant and by these presents forever defend.

In witness whereof the said parties of the first part have hereunto set their hands and seals the day and year above written.

I. S. KALLOCH. [SEAL.]
CAROLINE P. KALLOCH. [SEAL.]

(Stamp, 3.50.)

Sealed and delivered in presence of—

STATE OF KANSAS, }
Franklin County, } *ss:*

On this ninth day of December, in the year of our Lord one thousand eight hundred and sixty-five, before me personally came I. S. Kalloch and Carolne P., his wife, to me known to be the individuals described in and who executed the within conveyance, who severally acknowledged that they executed the same.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year last above written.

[SEAL.] ASA L. LATHROP,
Notary Public in and for said County.

[Endorsed:] Recorded June 19, 1866, at 3 o'clock p. m., H. F. Sheldon, reg. of deeds. Recorded in book "F," page 183. A true copy. H. B. F. Keller, reg. of deeds, by Jno. W. Ramsey, deputy. Fee, $1.00 paid.

The plaintiff then read in evidence the deposition filed in this cause April 30th, 1880, of himself, of which (except the caption and other formal parts) the following is a copy:

1st Question. What is your name, age, occupation, and place of residence?

Ans. Washington Libbey; age, about 65; I am not in business now; place of residence, Chicago.

2. Are you the plaintiff in this case?

A. Yes, sir; I am.

3. Do you know the defendant, Wm. H. Clark, and if so how long have you known him?

A. I have known of him for 8 or 10 years.

4. Personally you are not acquainted with him, you say?

A. No, sir.

5. Look at the paper marked Exhibit "A," containing copies of three letters produced and shown to you at this the time of your examination. I want to ask you whether or not you ever received the original of the letter therein set forth, dated December 3, 1872; if so, when and where did you receive the same, and where is the original thereof?

A. I never received it.

6. Whether or not did you receive the letter therein set forth dated February 17th, 1873; if so, when, where, and how did you receive the same, and where is the original thereof?

A. Well, in February, 1873, I received a letter from Mr. Clark. I could not say where the original thereof is. I received it when I was at my office, under the First National Bank. I received it by mail. I am satisfied that is a correct copy of the letter, a copy of which is set forth in Exhibit "A."

7. Whether or not is the letter in Exhibit "A," dated March 5th, 1873, a true copy of a letter sent by you in answer to the letter of February 17th, 1873?

A. I think it is.

8. Did you ever have or receive any other letters from Mr. Clark than that of February 17th, 1873, above mentioned?

A. I never did.

16 9. Will you annex said Exhibit "A" to this your deposition and make the same a part thereof?

A. I will.

10. Look upon the written agreement signed William H. Clark, produced and shown to you at this the time of your examination, and state whether or not, at the time of the sending by you of that letter, dated March 5, 1873, or at the time of the receipt by you of the letter dated February 17th, 1873, you were aware of the existence of any such agreement as that set forth in said exhibit B?

A. No, sir.

11. When did you first learn of the existence of any such agreement?

A. After the former suit concerning this land was commenced between William H. Clark and myself, I was informed of it by Mr. H. P. Welsh, Esq., of Ottawa, Kansas.

12. Will you make this Exhibit "B" a part of your deposition and annex the same thereto?

A. Yes, sir.

13. Is the deed whereby Isaac S. Kalloch and wife conveyed to you the land in dispute in this case, to wit, the east ½ of the west ½ of section 30, township 16, and range 20, and the east ½ of the northwest ¼ of section 31, township 16, and range 20, all in Franklin county, Kansas, in your possession or under your control? If not, what has become of the same?

A. It was burned in my safe in Chicago, October 9th, 1871.

WASHINGTON LIBBY.

Exhibit "A," mentioned in and annexed to said deposition, was then by the plaintiff given in evidence as follows:

"EXHIBIT A."

"OTTAWA, KANSAS *Dec.* 3, 1872.

"Washington Libby, Esq.

"DEAR SIR: On the 13th of last month I purchased from Wm. Hurr the following described lands, to wit: The E. ½ of the W. ½ of sec. 30 and the E. ½ of the northwest quarter of section 31, township 16, range 20, Franklin county, Kansas. And I find from the records in the office of the register of deeds in this county that you claim to have some kind of a title to said lands, and in order to perfect your title to said lands I hereby offer to sell you my title at the price of ten dollars per acre; and in order to give you time to investigate my title and satisfy yourself of its validity, I will give you until the 10th day of February, 1873, to complete the purchase of my title.

"I am yours, very respectfully, WM. H. CLARK."

"OTTAWA, KANSAS, *February* 17, 1873.

"W. Libby.

"DEAR SIR: I wrote you in December last in regard to the land here, which you bought of Kalloch, and I have since learned from Mr. Kalloch that you intend to fight me to the bitter end; and as there is a question as to who has the better title, you or I, and as I don't feel able to fight you, I should much rather settle than fight. When I bought the land from Hurr I only gave him $200 for it; but I don't feel able to lose that sum; and as I agreed with Hurr to give you the first chance to buy me out, I would like you to make
17 me an offer of what you will give; and as I assure you that any offer you may make me will be favorably considered, at least write me and tell me the best you will do, for I am anxious to get clear of the thing.

"Yours truly, W. H. CLARK."

"CHICAGO, *March 5th*, 1873.

"W. H. Clark, Esq.

"DEAR SIR: Your favor of the 17th has come to hand, and contents

noted. The land you refer to I have had a warranty deed for several years from I. S. Kalloch.

"Yours truly,

"WASHINGTON LIBBY."

The plaintiff then read in evidence said Exhibit "B," mentioned in and annexed to said deposition, as follows:

"Know all men by these presents, that I, W. H. Clark, of Ottawa, Franklin county, Kansas, have this day received from William Hurr, of the Ottawa Nation, Indian Territory, a quit-claim deed to the following described tract or parcel of land, situated in Franklin county, State of Kansas, to wit: The east half of the west half of sec. 30; also the E. ½ of the N. W. ¼ of section 31; both tracts of land in township sixteen, range twenty; also the E. ½ of the northwest quarter of section seven, township seventeen, range twenty, all of said land containing three hundred and twenty acres. And I do hereby agree to notify certain parties who claim to have title to said land from William Hurr that I now have the same, and to offer to perfect their said title to said land, and it is hereby agreed and understood that in case said parties refuse and neglect to purchase the said title within sixty days from the date of notification, then, and in that case, I am to be released from any and all obligations to convey the said title to said parties.

"In witness whereof I have hereto set my hand, this 13th day of November, A. D. 1872.

"WM. H. CLARK."

The plaintiff then gave in evidence an extract from an affidavit for a continuance, the facts alleged in which, said Clark consented, should on said trial be read and treated as the deposition of William Hurr, in the words and figures following: "That he is the original allottee of the land in dispute in this action; that on or about the 1st of December, 1865, he and his wife conveyed the same in fee with general warranty to I. S. Kalloch for its then full value paid to him in cash; that afterwards, on or about the 13th of November, 1872, the defendant, Clark, came to him (said Hurr), then at his home in the Indian Territory, and represented to him that the title to the said land so conveyed by him to Mr. Kalloch was defective or doubtful, and that Mr. Kalloch had conveyed it with warranty to Mr. Washington Libby, the plaintiff; that he, said Clark, desired to get from Mr. Hurr and wife a quit-claim deed, conveying the property to him, Clark, for the purpose of conveying it over to Libby in order to perfect and confirm his title acquired from Kalloch, and that he, Clark, would convey to Libby, on receiving from him the $200, he would pay Hurr for such quit claim, and a fair compensation in addition to the said $200 for his, Clark's, services in procuring such quit claim; that thereupon said Hurr, induced by and relying on said representations, made, executed, and delivered to said Clark his quit-claim deed purporting to convey said real estate to him in fee in consideration of $200 then paid to him by Clark, (although the land was then worth about $3,000,) and of a written obli-

18 gation, then and there made, executed, and delivered to him by said Clark, which is annexed as an exhibit, marked 'B,' to the deposition of said Libby now on file in this cause; and that he, said Hurr, would not have executed said quit-claim deed to said Clark without the obligation aforesaid; and that said quit claim is the only conveyance of said property he (said Hurr) ever made to said Clark."

The said affidavit for a continuance was filed in this cause May 17th, 1880.

The parties then admitted that the former action between them, wherein Clark was plaintiff and Libby was defendant, concerning the same land, after the decision of the Supreme Court, reported in 14 Ka's reports 435, and 17th Kansas reports, at page 634, was removed by said Libby to the circuit court of the United States for the district of Kansas, and was, before any trial or hearing had, dismissed by virtue of a stipulation between the parties, of which (except the caption and signatures of the parties) the following is a copy: "It is stipulated that the transcript removing this cause to said court may be docketed on Tuesday, the 27th of November, A. D. 1877, and that said cause be then dismissed by the plaintiff, at his cost, without prejudice to either party bringing a new action, either at law or in equity, or both."

The defendant, Clark, then admitted that the only title he claimed to the lands in dispute in this suit was under and by virtue of the quit-claim deed from William Hurr and wife, hereinbefore mentioned.

The plaintiff then rested.

This case made contains all the evidence given or offered in said cause.

The defendant then filed and interposed a demurrer to the foregoing evidence, of which demurrer the following, except the caption and signature of counsel, is a true copy:

"Now, on the trial of this cause, at the close of the plaintiffs evidence, the defendant interposes and files this his demurrer thereto, and for cause of demurrer says:

"That no cause of action has been proven by the plaintiff against the defendant."

Whereupon, then and there, the said demurrer was argued by counsel of each party; on consideration whereof the court sustained said demurrer. To which ruling and decision the plaintiff then and there duly excepted; and thereupon the court discharged said jury.

The plaintiff then and there, on the same day of said trial, filed his motion for a new trial of said cause, of which (except caption and signature of counsel) here follows a true copy:

"And now comes the said Washington Libby, plaintiff, and moves the court here to grant him a new trial of this cause, because—

"1. The decision thereof at the former trial by this court, heretofore rendered, sustaining the demurrer of the defendant to the evidence of the plaintiff filed herein, is not sustained by sufficient evidence, and is contrary to law.

"2. For error of law occurring at said trial, and then and there excepted to by this plaintiff."

Which motion for a new trial was, on the 28th day of May, 1880, at the same term of said court, argued by counsel of the respective parties, upon consideration whereof the said court overruled and denied said motion. To which ruling the plaintiff then and there duly excepted, and for good cause shown the plaintiff was by the court allowed sixty days' time from and after the close of the said term of said court wherein to make, settle, and have signed a case-made for the supreme court herein. And thereupon on the
19 same day at said term of the court the court rendered and entered a judgment in said cause, of which here follows a copy, viz:

"It is therefore adjudged and decreed by the court here that said defendant doth not unlawfully keep the said plaintiff out of the possession of the said real estate in his petition mentioned, to wit: the east half of the west half of section 30, also the east half of the northwest quarter of section 31, all in township 16, of range twenty, in Franklin county, Kansas, as the said plaintiff hath alleged, and that said defendant go hence without day and recover his costs, taxed to $——.

We agree that the foregoing case-made is correct, and may be allowed, settled, and signed by the judge accordingly.

JNO. W. DEFORD, *Att'y for Plaintiff.*
WM. H. CLARK AND A. W. BENSON,
Att'y for Defend nt.

And now, to wit, 5th of June, 1880, the foregoing case-made is, by consent of all parties to the above-entitled cause, hereby settled, allowed, and signed by me.

N. T. STEPHENS,
Judge of the 4th Judicial Dist.

Attest: [SEAL.] S. L. PATRICK, *Clerk.*

(Endorsed:) 2055. Washington Libby *v.* William H. Clark. Filed June 7th, 1880. S. L. Patrick, clerk. Case-made. Filed July 20, 1880. C. J. Brown, clerk supreme court.

20 And also, to wit, the twenty-eighth day of July, A. D. 1880, there was filed in the office of the clerk of the supreme court of the State of Kansas a petition in error, in the above-entitled cause, which is in words and figures as follows, to wit:

Petition in Error.

In the Supreme Court of Kansas.

WASHINGTON LIBBY, Plaintiff in Error,
vs.
WILLIAM H. CLARK, Defendant in Error. } No. —.

The said Washington Libby, plaintiff, complains of the said William H. Clark, defendant, for that the said William H. Clark, at the

May term, 1880, of the district court of Franklin county, Kansas, recovered a judgment by the consideration of said district court against the said plaintiff in a certain action then pending in said district court, wherein the said Washington Libby was plaintiff and the said William H. Clark was defendant, a copy of the record of the judgment and proceedings in which case, duly certified, is hereto attached, marked "A," and made a part of this petition; and the said Washington Libby avers that there is error in said record and proceedings in this, to wit:

1. That the said district court erred in sustaining the demurrer of the said defendant, William H. Clark, to the evidence of the said plaintiff.

2. That the said district court erred in ruling out the evidence offered by the said Washington Libby on the trial of the said action.

3. That the said district court erred in overruling the motion of said Washington Libby for a new trial of said action.

4. That the said judgment was given for the said William H. Clark when it ought to have been given for the said Washington Libby according to the law of the land.

The said Washington Libby, plaintiff, therefore prays that the said judgment may be reversed and the said plaintiff restored to all things he has lost by reason thereof, and for the costs of this cause.

JNO. W. DEFORD,
Att'y for Pl'ff.

(Endorsed:) Filed July 28, 1880. C. J. Brown, clerk supreme court.

21 And also on, to wit, the twenty-eighth day of July, A. D. 1880, there was filed in the office of the clerk of the supreme court of the State of Kansas a waiver of the issuance and service of a summons in error in the above-entitled cause, which is in words and figures as follows, to wit:

In the Supreme Court of Kansas.

WASHINGTON LIBBY *vs.* W. H. CLARK.

I hereby waive the issue and service of summons in error in the above-entitled case, and enter my appearance as defendant in error therein.

Dated July 26, 1880.

WM. H. CLARK,
Def't in Error.

(Indorsed:) 2055. Wash. Libby *vs.* W. H. Clark. Waiver of summons. Filed July 28, 1880. C. J. Brown, clerk supreme court.

And afterwards, to wit, on the eighth day of October, A. D. 1880, the same being one of the regular judicial days of the July term, A. D. 1880, before said court, in session at the supreme court room, in the city of Topeka—present, Honorable Albert H. Horton, chief justice; Honorable Daniel M. Valentine and Honorable David J.

Brewer, associate justices, and C. J. Brown, clerk of said court—the following proceedings, among others, was had and entered of record on page 55 of journal "H," as follows:

WASHINGTON LIBBY, Pl'ff in Error,
vs.
WM. H. CLARK, Defendant in Error.

This cause came on to be heard on petition in error and transcript of the record of the district court of Franklin county, and was submitted on briefs of counsel, John W. Deford, Esq., for plaintiff in error, and W. H. Clark, Esq., for defendant in error, and taken under advisement by the court.

22 And afterwards, on, to wit, the eighth day of June, A. D. 1881, the same being one of the regular judicial days of the January term, A. D. 1881, of the supreme court of the State of Kansas, before said court, in session at the supreme court-room in the city of Topeka—present, Honorable Albert H. Horton, chief justice, Honorable Daniel M. Valentine and Honorable David J. Brewer, associate justices, and C. J. Brown, clerk of said court—the following proceedings, among others, *was* had and entered of record on page 246 of Journal "H," as follows:

WASHINGTON LIBBY, Plaintiff in Error,
vs.
WM. H. CLARK, Defendant in Error.

This cause came on for decision, and thereupon it is ordered and adjudged that the judgment of the court below be affirmed with costs, and hereof let execution issue.

Valentine, J., delivered the opinion of the court.

All the justices concurring.

And also on, to wit, the eighth day of June, A. D. 1881, the same being one of the regular judicial days of the January term of A. D. 1881 of the supreme court of the State of Kansas, there was filed in the clerk's office in said court the syllabus and opinion of the court in said cause. A copy of each is hereunto annexed, which are in words and figures as follows, to wit:

23 *Error from Franklin County Affirmed.*

WASHINGTON LIBBY *vs.* WILLIAM H. CLARK.

Syllabus.

By the Court.

VALENTINE, J.:

Where C. purchases a piece of land from H. and obtains a quit-claim deed therefor, and the title to the land is in dispute, and, because of such dispute, C. enters into an agreement with H. as follows:

"I, C., do hereby agree to notify certain parties, who claim to have title to said land from H., that I now have the same, and to offer to perfect their title to said land; and it is hereby agreed and understood that, in case said parties refuse and neglect to purchase the said title within sixty days from the date of notification, then, and in that case, I am to be released from any and all obligations to convey the said title to said parties."

And afterward C. notifies L., who claims to own the land, giving L. a full and fair statement of his, C.'s, title, and asking L. to make him an offer of some kind for his title, and stating that any offer that L. may make will be favorably considered, and L. fails and refuses to make any offer or to purchase C.'s title, and C. afterward obtains the possession of the land, and nearly seven years after the notification to L. of C.'s title, L. commences an action of ejectment to recover the land from C., and L., in fact, has no title to the land, except such title as he may have obtained by virtue of said agreement entered into between C. and H.; held that L. cannot maintain the action.

All the justices concurring.

A true copy.

Attest: ——— ———,

Clerk Supreme Court.

24 WASHINGTON LIBBY *vs.* WILLIAM H. CLARK.

The opinion of the court delivered by VALENTINE, J.

This was an action of ejectment brought by Washington Libby against William H. Clark for the recovery of certain real estate. The subject-matter of this action is precisely the same as that of the case of William H. Clark against Washington Libby, which has twice been in this court, and reported in 14 Kas., page 435, and Kas., 634. After the case of Clark against Libby had been returned the second time from this court to the district court, the defendant in that case, Washington Libby, removed the case from the district court of Franklin county to the circuit court of the United States, where, upon stipulation of the parties, the case was dismissed without prejudice. Clark in the meantime obtained possession of the property. Libby then commenced this action in the district court of Franklin county, Kansas. A trial was had in the district court, which resulted in a judgment in favor of Clark and against Libby; and Libby now brings the case to this court, seeking a reversal of said judgment.

The facts in this case are reported in the case of Clark *vs.* Libby, 17 Kas., p. 634, *et seq.* The only new facts in the case are embodied in an affidavit for a continuance filed by Libby and read on the trial of the case with the consent of Clark as the deposition of William Hurr. Said facts are as follows:

"That afterwards, on or about the 13th of November, 1872, the defendant, Clark, came to him (said Hurr), then at his home in the Indian Territory, and represented to him that the title to said land

so conveyed to him by Mr. Kalloch, was defective or doubtful; and that Mr. Kallock had conveyed it with warranty to Mr. Washington Libby, the plaintiff; that he, said Clark, desired to get from Mr. Hurr and wife a quit-claim deed conveying the property to him, Clark, for the purpose of conveying it over to Libby, in order to perfect and confirm his title acquired from Kalloch; and that he, Clark, would convey to Libby on receiving from him the $200. He would pay Hurr for such quit claim, and a fair compensation, in addition to the said $200.00, for his, Clark's, services in procuring such quit claim; that thereupon said Hurr induced, and relying on said representations, made, executed, and delivered to said Clark his quit-claim deed, purporting to convey said real estate to him in fee, in consideration of $200.00 then paid to him by Clark (although the land was then worth about $3,000.00), and of a written obligation then and there made, executed, and delivered to him by said Clark, which is annexed as an exhibit, marked "B," to the deposition of said Libby, now on file in this cause; and that he, said Hurr, would not have executed said quit-claim deed to said Clark without the obligation aforesaid; and that said quit-claim deed is the only conveyance of said property he (said Hurr) ever made to said Clark."

Said Exhibit B is copied in full in 17 Kas., p. 635; but the only portion of it which has any special application to this case reads as follows:

"I (William H. Clark) do hereby agree to notify certain parties, who claim to have title to said land from William Hurr, that I now have the same, and to offer to perfect their title to said land; and it is hereby agreed and understood that, in case said parties refuse and neglect to purchase the said title within sixty days from the date of notification, then, and in that case, I am to be released from any and all obligations to convey the said title to said parties."

We do not think that these new facts can make any possible difference in the decision of this case. Clark has complied with everything that he agreed to do. He notified Libby of his purchase of the property from Hurr, on December 3, 1872; and he again notified Libby of said purchase on February 17, 1873, giving Libby a full and fair statement of his title, and asking Libby to make him an offer of some kind for his title, and stating that any offer that Libby might make would be favorably considered; but Libby refused to make any offer, but stated substantially to Clark that his title was already good enough. Clark not only waited the sixty days from the notification of Libby, as he had agreed to do, but he also waited about three months before considering his own title good, or before commencing any proceedings to obtain the property. And he has now waited several years without Libby even offering to pay anything for his title. The first notification was given on December 3, 1872, and this action was commenced by Libby on November 20, 1879, nearly seven years afterward. Even if Libby obtained any rights under or by virtue of said instrument in writing, marked "Exhibit B," and which Clark executed, he has forfeited all such rights by refusing to comply with

its terms, or to accept anything under it; and Libby does not even now offer to pay Clark anything for his title.

The judgment of the court below will be affirmed. All the justices concurring.

A true copy.

Attest:

_____ _____,

Clerk Supreme Court.

26 *Assignments of Error.*

In the Supreme Court of the United States of America.

WASHINGTON LIBBEY, Plaintiff in Error,

vs.

WILLIAM H. CLARK, Defendant in Error.

In error to the supreme court of Kansas.

And now comes Washington Libbey, plaintiff in error, above named, by George R. Peck and J. D. McFarland, his attorneys, and says that in the record and proceedings aforesaid—that is, in the re-record and proceedings mentioned in the writ of error herein—there is manifest error in this, to wit:

First. That the said supreme court of Kansas erred in affirming the judgment of the district court of Franklin county, Kansas, and in not reversing said judgment of said district court and ordering that judgment be rendered in said cause in said district

27 court of Franklin county in favor of said plaintiff in error and against said defendant in error.

Secondly. That the said supreme court of Kansas erred in holding and adjudging that the deed to the lands described in the petition of plaintiff in error, filed in the district court aforesaid, executed by William Hurr to the grantor of the plaintiff in error, was null and void.

Thirdly. That the said supreme court of Kansas erred in holding and adjudging that said lands were inalienable to other persons than Ottawa Indians during the five years succeeding the ratification of the treaty by virtue of which said lands were patented to said William Herr.

Lastly. That the said supreme court of Kansas erred in giving judgment for the defendant in error herein, whereas, by the law of the land, it ought to have given judgment for the plaintiff in error herein.

28 And the said Washington Libby prays that the judgment of the supreme court of Kansas be reversed, annulled, and held for naught; that the judgment of the district court of Franklin county, Kansas, aforesaid, may be reversed, annulled, and held for naught, and said district court ordered and directed to give judgment for the plaintiff in error herein and against the defendant in error herein, and that this plaintiff in error may be restored to all things he has lost by occasion of said judgments.

GEORGE R. PECK,
J. D. McFARLAND,
Attorneys for Plaintiff in Error.

29 Supreme Court.

STATE OF KANSAS, *ss:*

I, C. J. Brown, clerk of the supreme court of the State of Kansas, do hereby certify that the above and foregoing is a true and complete copy of the pleadings, of the record of proceedings had, of the judgment rendered, the syllabus and opinion filed, and the original writ of error, citation, bond, and assignment of error in the above-entitled cause, as the same remain of record and on file in my office.

In witness whereof I have hereunto subscribed my name and affixed the seal of the supreme court of the State of Kansas, at my office in Topeka, Kansas, this second day of June, A. D. 1883.

[Seal Supreme Court, State of Kansas.]

C. J. BROWN,
Clerk of the Supreme Court of the State of Kansas.

[Endorsed:] Washington Libby, pl'ff in error, *vs.* Wm. H. Clark, def'd't in error. Record, &c.

Endorsed on cover: Kansas supreme court. No. 236. Washington Libby, plaintiff in error, *vs.* William H. Clark. Filed 21st June, 1883.

118-250

APR 6 1886

In the Supreme Court of the United States.

OCTOBER TERM, 1885.

WASHINGTON LIBBY,
PLAINTIFF IN ERROR,
vs.
WILLIAM H. CLARK.

No. 236.

Brief for Plaintiff in Error.

GEO. R. PECK,
A. T. BRITTON,
A. B. BROWNE,
Attorneys for Plaintiff in Error.

WASHINGTON:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1886.

In the Supreme Court of the United States.

OCTOBER TERM, 1885.

WASHINGTON LIBBY, PLAINTIFF IN ERROR,
v.
WILLIAM H. CLARK.
No. 236.

STATEMENT OF THE CASE.

Libby, plaintiff in error here, brought ejectment against Clark in the District Court of Franklin County, Kansas, for the recovery of the E. ½ of W. ½, section 30, and E. ½ of N.W. ¼, section 31, all in township 16, of range 20, in Franklin county, Kansas. Both parties claim through conveyances from William Hurr. The deed through which Libby claims was made by Hurr and wife December 1, 1865, to I. S. Kalloch, who subsequently conveyed to Libby. Clark's deed is directly from Hurr and wife, and was made November 13, 1872. Hurr was one of the headmen or councilmen of the Ottawa tribe of Indians, and derived title by patent under the first clause of the Third Article of the treaty between the United States and the Ottawa Indians proclaimed July 28, 1862, (12 Stats.-at-Large, 1239.)

This article is as follows:

"ARTICLE III. It being the wish of said tribe of Ottawas "to remunerate severals of the chiefs, councilmen, and

" headmen of the tribe for their services to them many " years without pay, it is hereby stipulated that five sec- " tions of land is (are) reserved and set apart for that pur- " pose, to be apportioned among the said chiefs, council- " men, and headmen as the members of the tribes shall in " full council determine; and it shall be the duty of the " Secretary of the Interior to issue patents in fee-simple, " of said land, when located and apportioned to said " Indians. In addition thereto, said last-named persons, " and each and every head of a family in said tribe, shall " receive 160 acres of land, which shall include his or her " house and all improvements, so far as practicable; and " all other members of the tribe shall receive 80 acres of " land each, and all the locations for the heads of families, " made in accordance with this treaty, shall be made ad- " joining and in as regular and compact form as possible, " and with due regard to the rights of each individual " and of the whole tribe."

The question is, whether the treaty imposed any restriction upon the right of alienation of lands set aside to the chiefs, headmen, and councilmen under the above article.

Article VII of the treaty is supposed, by our opposing counsel, to contain restrictions on the power of alienation of the lands granted to the chiefs, headmen, and councilmen by Article III. We will quote it in full further on.

The court below held, following its decision of the same question between the same parties in two previous cases, that the restrictions of Article VII relate to lands set aside to the chiefs and headmen under Article III, as well as to all other lands held under the treaty.

Clark *v.* Libby, 14 Kans., 435.
Clark *v.* Libby, 17 Kans., 634.

There was a question below as to the effect of an agreement made by Clark with Hurr at the time the quit-claim deed from Hurr and wife to Clark was executed, but that question is not for review here.

SPECIFICATION OF ERRORS.

The court below erred:

1st. In holding that the lands in question were inalienable at the time of the conveyance by Hurr and wife to Kalloch.

2d. In holding that the restrictions upon alienation contained in Article VII of the treaty included lands set apart to the chiefs and headmen by virtue of Article III.

ARGUMENT.

The tribe was advanced in civilization, as stated in the First Article of the treaty, and it was desired by the members that the tribal organization should be dissolved at the expiration of five years.

Article III is devoted to two separate purposes:

1st. To renumerate the chiefs, headmen, and councilmen for their services, by a grant of lands.

2d. To apportion the common lands of the tribe to the members in severalty.

The tribe and the Government acting together, through the medium of a treaty, had the undoubted power to accomplish these purposes.

And in the disposition of the lands they had the unquestioned right of attaching such limitations upon alienation as might seem proper.

The five sections, to be set apart for the chiefs, headmen, and councilmen, were to go to them, not as their share of the lands which they were to receive as members of the tribe, but were extra lands given to them as payment for services. They stand upon their own basis, outside of the provisions of the treaty for the division of the common lands among the members. That is to say, the chiefs and headmen were to receive these extra lands, not

because they were Indians, nor because they were chiefs and headmen, but because they had rendered services for which they were entitled to payment. What they were to receive merely as members of the tribe is provided for in the second clause of Article III. Now, the Court will observe that by the express terms of the sentence which provides for the payment of these chiefs and headmen, it is distinctly and positively declared that "it shall be the "duty of the Secretary of the Interior to issue patents in "*fee-simple* of said lands when located and apportioned to "said Indians." Nothing can be clearer than this language. That a fee-simple title includes the power of alienation is too plain for discussion. Undoubtedly a treaty may vest a fee-simple title, to which restrictions upon alienation are attached, or at least it may vest what is called a fee-simple with such restriction, and the restriction will control the title. But the question here is whether any such restriction was attached to these lands. It will be admitted that none is to be found in Article III. The quantity of lands which shall be devoted to paying the chiefs and headmen, the manner of apportioning them, and the kind of title they shall receive, are all provided for in a single comprehensive sentence; after which the treaty goes on to deal with other matters. The Court will observe that this sentence provides what kind of a patent shall be issued, but in the next sentence, which provides for the division of the common lands among the members of the tribe in severalty, no provision is made for patents and nothing said as to the kind of title they shall receive. These matters were left to be provided for in a subsequent article. But as to the first part of Article III, providing for the payment of the chiefs and headmen, the kind of patent and the nature of the title are distinctly fixed and nothing left for subsequent provisions of the treaty.

The court below held that the restrictions of Article VII control the alienation of these compensatory lands, as well as those which the members of the tribe receive upon the division of the lands held in common. We believe we can show beyond question that this is an erroneous view of the provisions of Article VII.

The article is as follows:

"ARTICLE VII. There shall be set apart ten acres of "land for the benefit of the Ottawa Baptist Church, and "said lands shall include the church building, mission-"house, and grave-yard, and the title to said property "shall be vested in a board of five trustees, to be appointed "by said church in accordance with the laws of the State "of Kansas.

"And in respect for the memory of Rev. J. Meeker, de-"ceased, who labored with unselfish zeal for nearly "twenty years among said Ottawas, greatly to their spir-"itual and temporal welfare, it is stipulated that 80 acres "of good land shall be, and hereby is, given, in fee-"simple, to each of the two children of said Meeker, viz., "Emmeline and Eliza; their lands to be selected and lo-"cated as the other allotments herein provided are to be "selected and located, which lands shall be inalienable "the same as the lands allotted to the Ottawas.

"And all the above-mentioned selections of lands shall be "made by the agent of the tribe under the direction of the "Secretary of the Interior. And plats and records of all "the selections and locations shall be made, and upon their "completion and approval, proper *patents* by the United "States shall be issued *to each individual member* of the "tribe and person entitled for the land selected and al-"lotted to them, *in which* it shall be stipulated *that no* "*Indian, except as herein provided, to whom the same may* "*be issued, shall alienate or encumber the land allotted to* "*him or her in any manner until they shall, by the terms* "*of this treaty, become a citizen of the United States; and* "*any conveyance or encumbrance of said lands, done or* "*suffered, except as aforesaid, by any Ottawa Indian, of*

" *the lands allotted to him or her, made before they shall* " *become a citizen, shall be null and void.*

" And forty acres, including the houses and improve- " ments of the allottee, shall be inalienable during the " natural lifetime of the party receiving the title:

" *Provided*, That such of said Indians as are not under " legal disabilities by the local laws may sell to each other " such portions of the lands as are subject to sale, with " the consent of the Secretary of the Interior, at any " time."

This article, after remembering the Ottawa Baptist Church and the two children of Rev. J. Meeker, goes on to provide for the selections by the agent, and then the provision, " proper *patents* shall be issued to each individual member of the tribe and person entitled for the land selected and allotted to them in which it shall be stipulated," &c.

Does this provision apply to the lands set aside to the chiefs, headmen, and councilmen in payment for their services? We say most plainly and obviously it does not.

First: Such a construction involves a manifest absurdity. Article III had already provided that patents should issue for the compensatory lands to the chiefs and headmen. There was therefore no necessity for another provision that patents should issue as to those lands. The second clause of Article III was silent as to patents and as to the kind of title the individual Indian should receive, leaving those questions to be disposed of in a subsequent article. Clearly therefore when the provisions of Article VII are made to relate back to other articles of the treaty they attach to such provisions as have been left open for them to attach, and not to matters which were completed and disposed of in such preceding articles. Besides, the term " each " individual member " indicates that it relates to the allot-

ments to the members of the tribe *as such*. The "other "persons" mentioned in the same connection are obviously the two Meeker children, upon whom a restriction upon alienation was placed no doubt because of their sex and immature years. The construction which the court below put upon this article is a forced, unnatural, and unreasonable one. The restrictions provided for in Article VII are to be inserted in the patents provided for in Article VII. But neither upon the face of the treaty nor in the circumstances surrounding its negotiation is there any reason for making it apply to the patents which it was made the duty of the Secretary of the Interior to issue for the lands given to the chiefs and headmen as compensation.

Secondly. But let us look into the reasons of the matter. Why did the treaty provide for patents in fee-simple absolute, as to the compensatory lands, and with restrictions as to the allotments for individual members? This question, which seems to us to be a decisive one against the decision of the court below, is easily answered by an examination of the treaty. The lands allotted to the individual members of the tribe were homesteads, dwelling places, and a restriction upon alienation was a wise and salutary one. But the compensatory lands were extra, additional, and given not for a home, but for a payment of an indebtedness acknowledged in the treaty. The Court will notice the provision for including in the allotments to heads of families the house and improvements. The jealous care with which the homestead is guarded is further shown by the last provision of Article VII, that "forty acres, including the houses and improvements of "the allottee, shall be inalienable during the natural life-"time of the party receiving the title." This provision, and the provision against alienation for five years, is of course as applicable to the chiefs and headmen as to any other

member of the tribe, as to such lands as they receive as allottees of the common tribal lands. But they receive the compensatory lands not as allottees, nor as members of the tribe, but as individuals who have rendered valuable services to the tribe. There was no reason for making these inalienable. They were taken as payment in lieu of money, and if they were to be of any benefit to those receiving them they must be capable of being disposed of.

Thirdly. We feel warranted in mentioning the conveyance of the lands by Hurr as a circumstance showing the construction placed upon the treaty at the time by those who made it. Hurr was one of the signers of the treaty. He seems to have been a man of intelligence, and capable of understanding a contract to which he had been a party. In the Sixth Article of the treaty he is named as one of the trustees to manage the fund of the College at Ottawa. The record shows that *he* understood that the treaty, in the negotiation and execution of which he had taken part authorized the alienation of the lands received as compensation for services. He refused to convey to Clark until the latter, who is a lawyer, assured him that he wanted a conveyance simply to protect Libby, and that he would convey it over to Libby.

We submit the judgment below should be reversed.

GEO. R. PECK,
A. T. BRITTON,
A. B. BROWNE,
Atty's for Pl'ff in Error.

118-250

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IN THE SUPREME COURT

—OF THE—

UNITED STATES.

WASHINGTON LIBBY,
Plaintiff in Error,

vs.

WILLIAM H. CLARK,
Defendant in Error.

ERROR TO THE SUPREME COURT OF KANSAS.

BRIEF OF DEFENDANT IN ERROR.

IN THE SUPREME COURT

—OF THE—

UNITED STATES.

WASHINGTON LIBBY,
Plaintiff in Error,

vs.

WILLIAM H. CLARK,
Defendant in Error.

ERROR TO THE SUPREME COURT OF KANSAS.

BRIEF OF DEFENDANT IN ERROR.

—o—

I.

In March, 1873, in the Franklin County, Kansas, District Court, Wm. H. Clark, defendant in error herein, commenced an action in ejectment against Washington Libby, plaintiff in error herein, for the possession of the same land described in this action. The case was tried in that court on the sole issue as to the proper construction of the treaty of U. S. with the Ottawa Indians,—U. S. Stat. at Large, vol. 12, p. 1237,—was decided against Clark, who took the case on error to the Kansas Supreme Court, where the case was heard on the same issue, and at the January term,

1874, of that court, decided in favor of Clark, and reversed and remanded.—14, Kas. Rep., p. 435. Libby then amended his answer and set up an equitable defence.

The case was tried again and again, decided against Clark, who again took the case on error to Kansas Supreme Court, when it was heard, and again at the January term, 1877, decided in favor of Clark, and reversed and remanded.—17, Kas. Rep., p. 634. Libby then removed the case to the U. S. Circuit Court, where by agreement the case was dismissed on November 27th, 1877, and Clark took possession of the land; and afterwards, in 1880, Libby commenced this action. See printed record, p. 18.

And we claim that the construction of the treaty was not at issue in this case. No decision on that question was asked for by the parties, and none rendered. The parties had litigated that question in the other cases. Libby agrees to a dismissal, yields possession of the land, and two years afterwards brings this case in the Kansas courts for the purpose of trying another issue.

The evidence and the decision of the Kansas Supreme Court, (printed rec. p. 18,) shows that the construction of the treaty was not before the court. The court neither affirm or deny the validity of the deed from Hurr to Kalloch, (printed rec. p. 6.) The court says nothing about it. That question had been decided years before, and is not again raised by Libby.

And we claim that this case, as it now stands before this court, presents no federal question, and ask for a dismissal.

—o—

II.

In case the court should hold that the construction of the treaty is properly before it, then the particular question in this case is this:—

Were the Ottawa Indians who received lands under the provisions of said treaty, permitted to alienate the five sections of land

set apart for the chiefs, etc., until by the terms of said treaty they become citizens of the United States?

1st. We would call the attention of the court to the following decisions:

Clark vs Libby, 14 Kans., 435.
Clark vs. Libby, 17 Kans., 634.
Clark vs. Akers, 16 Kans., 166.

2d. The 3d and 7th articles of the treaty U. S., with the Ottawa Indians —U. S. Stat. at Large, vol. 12, p. 1237—reads as follows:

ARTICLE III.—It being the wish of said tribe of Ottawas to remunerate several of the chiefs, councilmen, and headmen of the tribe, for their services to them many years without pay, it is hereby stipulated that five sections of land is reserved and set apart for that purpose, to be apportioned among the said chiefs, councilmen, and headmen, as the members of the tribes shall in full council determine; and it shall be the duty of the Secretary of the Interior to issue patents, in fee simple, of said lands, when located and apportioned, to said Indians. In addition thereto, said last-named persons, and each and every head of a family in said tribe, shall receive 160 acres of land, which shall include his or her house and all improvements, so far as practicable; and all other members of the tribe shall receive 80 acres of land each, and all the locations for the heads of families, made in accordance with this treaty, shall be made adjoining, and in as regular and compact form as possible, and with due regard to the rights of each individual and of the whole tribe.

ARTICLE VII.—There shall be set apart ten acres of land for the benefit of the Ottawa Baptist Church, * * *

And in respect for the memory of Rev. J. Meeker, deceased, who labored with unselfish zeal for nearly twenty years among said Ottawas, * * it is stipulated that 80 acres of good land shall be, and hereby is given, in fee simple, to each of the two children of said Meeker, viz: Emeline and Eliza; their land to be selected and located as the other allotments herein

provided are to be selected and located, which lands shall be inalienable the same as the lands allotted to the Ottawas.

And all the above mentioned selections of lands shall be made by the agent of the tribe, under the direction of the Secretary of the Interior. And plats and records of all the selections and locations shall be made, and upon their completion and approval, proper patents by the United States shall be issued to each individual member of the tribe and person entitled for the lands selected and allotted to them, in which it shall be stipulated that no Indian, except as herein provided, to whom the same may be issued, shall alienate or encumber the land allotted to him or her in any manner, until they shall, by the terms of this treaty, become a citizen of the United States; and any conveyance or encumbrance of said lands, done or suffered, except as aforesaid, by any Ottawa Indian, of the lands allotted to him or her, made before they shall become a citizen, shall be null and void.

And forty acres, including the houses and improvements of the allottee, shall be inalienable during the natural life-time of the party receiving the title; *Provided*, that such of said Indians as are not under legal disabilities by the local laws, may sell to each other such portions of their lands as are subject to sale, with the consent of the Secretary of the Interior, at any time.

3d. Article 3 provides that patents in fee simple shall be issued for the five sections; and the patent in this case conveyed to Hurr the entire title. The Government retained no control of the land nor interest in it, and when Hurr had power to sell he got the entire consideration. Hurr had a fee simple with a restriction on his power to alienate for a specified certain and reasonable time. The time fixed was July, 1867, only twenty months after the issue of patent.

Again, what has the Government usually meant by the term, fee simple, in an Indian treaty? By examining various treaties, we find the almost universal practice was to grant lands to the Indians in fee simple, and in a subsequent article in same treaty, to place a

restriction upon alienation. See 7 U. S. Stat. at Large, pp. 348,-9, 355,-6-7, 359, 360, 411, 433, 443.

4th. Article 3 provides for issuing patents in fee simple, to the chiefs, etc., and in article 7 is the following:

"And in respect for the memory of Rev. J. Meeker, deceased, " * * * it is stipulated that 80 acres shall be and hereby " is given in fee simple to each of Meeker's children, * * " which lands shall be inalienable the same as lands allotted " to the Ottawas."

The words, fee simple, certainly means the same in both places. The terms, fee simple, is explained "inalienable the same as the Ottawa lands."

5th. Article 3 provides—

"It being the wish of the tribe to remunerate the chiefs, * * " for their services many years without pay, it is stipulated " that five sections are set apart for that purpose, and the " Secretary to issue patents in fee simple;" and the 7th Art. says, "And in respect for the memory of Rev. J. Meeker, " who labored for nearly twenty years among the Ottawas, " * * * it is stipulated that 80 acres of land shall be given " his two girls, in fee simple, which lands are inalienable the " same as the Ottawa lands."

Both donations were a reward for services rendered, and if it was thought proper to prohibit the Meeker girls, who were white and educated, from selling their lands, the same reasoning would apply with greater force to the wild Indians.

6th. By examining Article 1 of the treaty, as first drawn, the proviso says:

"That John T. Jones, an educated and experienced man, is " declared to be a citizen of the United States, exempt from " the restrictions upon alienation of the Ottawa lands." * *

This proviso was stricken out by the Senate, and why? A careful examination of the treaty will show the only reason was because it exempted Jones from the restriction upon alienation, and if the Government refused in such a direct way to exempt Jones, who was educated and experienced, it is not probable that it was intended to exempt Hurr, who was neither. This proviso and the restriction on the Meekers, proves conclusively that it was the intention of the treaty that none of the Ottawa lands should be exempt from the restriction.

7th. Article 3 provides for setting apart the five sections for chiefs, and to each head of a family 160 acres, and to each member 80 acres; and Article 7 provides for 10 acres for Baptist Church, and 80 acres each for Meeker's girls, and Article 7 then reads as follows:

"And *all* the above mentioned selections of lands shall be "made, * * and plats and records of *all* the selections and "locations shall be made, * * and proper patents shall be "issued to each member of the tribe and person entitled for "the lands *selected* and *allotted* to them, in which it shall be "stipulated, * * *." Then follows the restriction upon alienation.

The words *all* must refer to something besides the 10 acres for the Baptist Church and Meeker girls land, and if it refers to the lands mentioned in Article 3, it must refer to all the lands mentioned in that Article. If the word "*all*" does not refer to the chiefs five sections, it does not refer to the 160 acre and 80 acre tracts; but any such construction would defeat one of the main provisions of the treaty. The word "all," certainly includes all the lands mentioned in both articles.

8th. Article 7 also provides—

"That 40 acres are inalienable during the life-time of the party "*receiving the same.* Provided, that such of said Indians "* * *may sell to each other*, such portions of their lands as

"are *subject to sale*, with the consent of the Secretary of the "Interior."

This shows that the Indians could not sell *any portion* of their lands to each other without the consent of the Secretary of the Interior, and to claim that the treaty provided better facilities for the white man to get their land than the other Indians, would be reversing the universal practice of the Government in dealing with the Indians.

In conclusion, we claim that the deed from Hurr to Kalloch, being dated December 1st, 1865, before the restrictions were removed, is void, and plaintiff has no title, and the decision of the lower court should be affirmed.

WILLIAM H. CLARK,

Defendant in Error, Attorney for himself.

S. SIMMS, JOB PRINTER, OTTAWA, ONT.